Filed 1/23/19 Marriage of Goodwin and Christensen CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re Marriage of SHALONDON and EDDIE GOODWIN.	B284416 (Los Angeles County Super. Ct. No. KD072453)
EDDIE GOODWIN, Appellant, v. SHALONDON CHRISTENSEN, Respondent.	

APPEAL from an order of the Superior Court of Los Angeles County, H. Don Christian, Commissioner. Reversed.

Eddie Goodwin, in pro. per., for Appellant.

No appearance for Respondent.

Eddie Goodwin (Goodwin) appeals a family court order declaring him a vexatious litigant and requiring him to obtain permission before filing future litigation in propria persona. We consider whether the order must be reversed because it was not preceded by a noticed motion.

I. BACKGROUND

Goodwin and Shalondon Christensen (Christensen) wed in 2001, had a daughter, A.G., in 2003, separated in 2007, and later dissolved their marriage. In February 2010, the family court awarded physical custody of A.G. to Christensen and joint legal custody to both parents. The court gave both parents the right to make health and education decisions for A.G., including decisions pertaining to her extracurricular activities and the course of any medical treatment. Only Christensen, however, was empowered to initially choose A.G.'s schools and primary physicians. Christensen remarried and relocated with A.G. to the Chicago area.

In May 2017, Goodwin filed a request for order (RFO) alleging Christensen violated a prior court order that required her to give him contact information for A.G.'s tutor and cheer coach. In a supporting declaration, Goodwin said Christensen told him A.G. did not have a tutor, whereas A.G. told him she did. In Goodwin's view, A.G. needed a tutor. Goodwin also stated he did not want Christensen to send A.G. to summer camp that year because A.G. had a dermatological condition that resulted in severe skin breakouts when she attended camp the previous summer. In addition, Goodwin said he wanted Christensen to send A.G. to a private school because "a lot of fights" occurred at the public school A.G. was set to attend.

In a responsive declaration to Goodwin's RFO, Christensen stated: A.G.'s skin problems the previous summer were caused by mosquito bites, A.G. "never had a tutor," A.G. was last on a cheer team three months prior and therefore did not currently have a cheer coach, and Goodwin was harassing both her and A.G.'s attorney.[1] A.G.'s attorney also filed a responsive declaration, which is not included in the appellate record.[2]

The family court held a hearing on Goodwin's RFO the following month. Goodwin had filed the RFO in propria persona and he represented himself at the hearing. A.G.'s lawyer and Christensen's attorney also appeared.

At the hearing, A.G.'s attorney said he had previously obtained and transmitted to Goodwin all requested information regarding A.G.'s extracurricular activities and tutoring. The attorney complained he was "tired and frustrated" by Goodwin's

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[1] In declarations Goodwin submitted in support of his RFO, he asserted Christensen's decision to send A.G. to camp despite her dermatological condition demonstrated Christensen was "mentally ill" and should "be in jail for child abuse" or "in a mental hospital." Goodwin also stated in a declaration that A.G.'s lawyer had "destroy[ed] [A.G.'s] life" by allowing her to be home-schooled and the lawyer was "not just sick physically" but also a "mentally sick" person who "continuously lie[d] at every opportunity." In an e-mail Goodwin sent to A.G.'s attorney one month before filing the RFO, Goodwin told him he hoped his "fat, sloppy ass [would] die from [his] upcoming surgery" so Goodwin would not "have to deal with [the attorney's] stupid racist, sickly ass any more."

[2] As noted *post*, we have reviewed the superior court file and our review of the file, including A.G.'s responsive declaration, is fully consistent with our disposition of this appeal.

behavior—which included sending e-mails attacking him and Christensen. A.G.'s attorney stated he believed Goodwin should be "classified as a vexatious litigant" because he was "doing what he wants to do without any support for the positions he has taken."

After hearing the parties' positions on the merits of Goodwin's RFO, the family court ordered "[a]ll existing orders [to] remain in full force and effect." The court told Goodwin it had already "made appropriate orders" allowing him—by virtue of having joint legal custody of A.G.—to communicate directly with schools and doctors and to seek medical treatment for A.G. or to obtain tutors. The court emphasized Goodwin simply needed to "enforce" his authority by speaking to those providers directly—rather than by requesting information from Christensen.

Picking up on counsel for A.G.'s suggestion during the hearing, the family court also ruled it would declare Goodwin to be a vexatious litigant, which would require him from that day forward "to get clearance from the supervising judge of the court in order to file a new and different [request for] hearing to bring everybody back into the court." The court called Goodwin's case "one of the more highly litigious cases in the history of [the] department" and remarked they had "been through repeated hearings on simple . . . and already addressed issues."[3] The court asserted that despite repeatedly addressing the same "old" issues, Goodwin's behavior went unchanged "in the sense of what [he could] do and how to handle [those issues]." The court found Goodwin "set these hearings repeatedly to upset the party, to

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[3] The bench officer hearing Goodwin's RFO had presided over all proceedings in the case since March 2008.

upset the attorney and counsel that [he] disagree[d] with . . . ." The court did not invite the parties to present evidence or argument about declaring Goodwin a vexatious litigant, nor did it allow Goodwin to respond to its ruling. The court informed him it would be fruitless to move for reconsideration and he should seek a remedy, if he so desired, in the Court of Appeal.

II. DISCUSSION

Goodwin contends we must reverse the order declaring him a vexatious litigant because (1) the family court rendered its decision without notice or a proper hearing, (2) there is insufficient evidence to support finding him a vexatious litigant, and (3) the court did not issue a written statement of the reasons for its decision. We agree the order must be reversed because the court's vexatious litigant designation did not proceed by way of a noticed motion and this deprived Goodwin of a fair hearing.

A. The Vexatious Litigant Statutes

"The vexatious litigant statutes ([Code Civ. Proc.,]§§ 391-391.7)[4] are designed to curb misuse of the court system by those persistent and obsessive litigants who, repeatedly litigating the same issues through groundless actions, waste the time and resources of the court system and other litigants. (*Bravo v. Ismaj* (2002) 99 Cal.App.4th 211, 220-221[(*Bravo*)].) Sections 391 to 391.6 were enacted in 1963, while section 391.7 . . . was added in 1990." (*Shalant v. Girardi* (2011) 51 Cal.4th 1164, 1169.) Section 391.7 was amended in certain respects, not relevant to

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[4] Undesignated statutory references that follow are to the Code of Civil Procedure.

this case, in 2011. (*John v. Superior Court* (2016) 63 Cal.4th 91, 96.) The vexatious litigant provisions have been held to be constitutional. (*Bravo*, *supra*, at p. 222.)

A person may be declared a "vexatious litigant" if he or she has done any one of the following: "(1) In the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing. [¶] (2) After a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, in propria persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined. [¶] (3) In any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay. [¶] (4) Has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based upon the same or substantially similar facts, transaction, or occurrence." (§ 391.)

Section 391.1 authorizes a defendant in a pending action to "move the court, upon notice and hearing," for an order requiring the plaintiff to "furnish security" or dismiss the plaintiff's pending litigation if the moving defendant makes a showing that

the plaintiff is a vexatious litigant and there is no reasonable probability the plaintiff will prevail in the litigation. The court may grant that motion after "consider[ing] any evidence, written or oral, by witnesses or affidavit, as may be material to the ground of the motion." (§§ 391.2, 391.3, subd. (a).)

Section 391.7, in contrast to section 391.1, does not require that any litigation be pending; instead, it provides prophylactic means to address a vexatious litigant. Section 391.7, subdivision (a) allows a court, "on its own motion or the motion of any party, [to] enter a prefiling order which prohibits a vexatious litigant from filing any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding justice or presiding judge of the court where the litigation is proposed to be filed." Once a person has been declared a vexatious litigant subject to a section 391.7 prefiling order, "[t]he presiding justice or presiding judge shall permit the filing of . . . litigation only if it appears that the litigation has merit and has not been filed for the purposes of harassment or delay. The presiding justice or presiding judge may [also] condition the filing of the litigation upon the furnishing of security for the benefit of the defendants . . . ." (§ 391.7, subd. (b).)

B. Goodwin Was Entitled to—but Did Not Receive—a Noticed Motion

Under prevailing law, the motion contemplated by section 391.7, subdivision (a) must be in writing and the party to whom the motion is directed must have the opportunity to prepare for and present evidence at a subsequent court hearing. In *Bravo*, *supra*, 99 Cal.App.4th 211, for instance, the Court of Appeal considered what procedures a court must adhere to before

declaring a person a vexatious litigant subject to a section 391.7 prefiling order. The defendants in that case moved the trial court to declare the plaintiff a vexatious litigant and to require him to obtain permission before filing any new litigation. (*Bravo*, *supra*, 99 Cal.App.4th at p. 218.) The plaintiff submitted a written opposition to the defendants' motion. (*Id.* at pp. 218-219.) The court then granted the defendants' motion without permitting oral argument. (*Id.* at p. 219.) The appellate court held it was error to declare the plaintiff a vexatious litigant and impose a prefiling order without first holding an oral hearing. (*Id.* at p. 225.)

The *Bravo* court observed that under sections 391.1 through 391.6, plaintiffs are expressly entitled to a hearing, one at which they may present "evidence, . . . by witnesses or affidavit, as may be material to the ground of the motion" (§ 391.2)—before being deemed a vexatious litigant required to furnish security. (*Bravo*, *supra*, 99 Cal.App.4th at p. 223.) The court held that same requirement should apply to section 391.7, even though that provision does not expressly provide for a hearing, because sections 391.1 through 391.7 employ the same vexatious litigant definition and section 391.7 "can impose burdens even more onerous than those provided by section 391.1."[5] (*Id.* at p. 225 ["Before the court may impose [the section 391.7 vexatious litigant designation], the plaintiff is entitled to the same protections set forth in section 391.2: a noticed motion

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[5] In particular, the *Bravo* court interpreted section 391.7 as permitting a court to require security from the plaintiff without finding the plaintiff's action lacks merit—in contrast to section 391.1. (*Bravo*, *supra*, 99 Cal.App.4th at p. 225.)

and a hearing which includes the right to oral argument and the presentation of evidence"]; accord, *Hupp v. Solera Oak Valley Green Assn.* (2017) 12 Cal.App.5th 1300, 1319.)

Even though *Bravo* chiefly addresses whether a hearing is required under section 391.7, the court's analysis extends to vexatious litigant motions themselves. We agree, for the reasons articulated in *Bravo*, that in order for a motion to be sufficient under section 391.7, it must conform to the requirements of sections 391.1 and 391.2. The motion must be "upon notice" and "supported by a showing" establishing its grounds. (§ 391.1.) After receiving notice, the subject party must have an opportunity to provide "evidence, written or oral, by witnesses or affidavit" for consideration at an oral hearing. (§ 391.2.)

In this case, the family court should not have imposed a section 391.7 prefiling order on Goodwin without Goodwin first having received a properly noticed motion.[6] While the appellate

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[6] Even if A.G.'s attorney's statement during the RFO hearing that Goodwin should be "classified as a vexatious litigant" could be deemed an oral motion, it was not "upon notice." (§ 1010 ["Notices must be in writing, and the notice of a motion, other than for a new trial, must state when, and the grounds upon which it will be made, and the papers, if any, upon which it is to be based"]; Fam. Code, § 210 [Code of Civil Procedure applies to family court cases unless the Family Code, or applicable rules, provide otherwise]; *In re Marriage of Hobdy* (2004) 123 Cal.App.4th 360, 365, fn. 8 [same].) Likewise, the court's ability to proceed on its "own motion" would also require written notice. (See, e.g., *In re Kinney* (2011) 201 Cal.App.4th 951, 957 [court issued order to show cause why litigant should not be designated a vexatious litigant in advance of oral hearing] (*Kinney*); *In re Luckett* (1991) 232 Cal.App.3d 107, 108 [court provided written notice to litigant that it "was considering entering a prefiling

record does not include the entire history of proceedings between Goodwin and Christensen, it includes sufficient materials—the docket, the filings associated with Goodwin's RFO hearing, and the reporter's transcript of that hearing (at which the family court explained to Goodwin what the term "vexatious litigant" means)—to demonstrate no noticed motion or order to show cause was filed before the family court declared Goodwin a vexatious litigant.[7]

C. Lack of Notice Requires Reversal in This Case

Our state Constitution requires a showing "that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13; see also § 475 [to merit reversal, record must show error "was prejudicial," the appellant "suffered substantial injury, and . . . a different result would have been probable if such error . . . had not occurred"].) Prejudice is conclusively presumed, however, in the rare circumstance where an error deprives a party of the right to a fair hearing; in that circumstance, the decision infected by the error is reversible per

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order" and "advising him of his right to appear before th[e] court" at a subsequent hearing at which he could "present argument and evidence"].)

[7] After Goodwin filed his brief in this appeal, we obtained the full superior court file for the proceedings in the superior court. We take judicial notice of the superior court file and our review confirms no motion or order to show cause to declare Goodwin a vexatious litigant was filed in advance of the RFO hearing.

se. (*Bravo*, *supra*, 99 Cal.App.4th at pp. 225-226[8]; see also *Gordon v. Nissan Motor Co., Ltd.* (2009) 170 Cal.App.4th 1103, 1114 ["when a trial court erroneously denies *all* evidence relating to a claim . . . , the error is reversible per se because it deprives the party offering the evidence of a fair hearing and of the opportunity to show actual prejudice"].) This case is that rare circumstance.

The lack of notice to Goodwin in this case effectively deprived him of a fair hearing on a matter of substantial importance.[9] Because he had no warning the family court was considering declaring him a vexatious litigant subject to a prefiling requirement, Goodwin had no opportunity to prepare a defense—e.g., to review the conduct defining a "vexatious litigant" under section 391, to present evidence that he did not fall within the statutory definition, or to seek the advice of

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[8] In *Bravo*, the court concluded the plaintiff received a fair hearing—and therefore declined to treat the error as reversible per se—because the plaintiff "had the full opportunity to file [an] opposition to defendants' motion to declare him a vexatious litigant, including declarations, affidavits and other relevant evidence, and . . . the court considered [the plaintiff's] opposition papers before granting the motion." (*Bravo*, *supra*, 99 Cal.App.4th at p. 226.) That did not happen here.

[9] While section 391.7 does not deny a litigant access to the courts, it certainly implicates that access. (*Bravo*, *supra*, 99 Cal.App.4th at pp. 221-222, 225; cf. *Molski v. Evergreen Dynasty Corp.* (9th Cir. 2007) 500 F.3d 1047, 1057 [federal courts should enter prefiling orders "only after a cautious review of the pertinent circumstances" because those orders "can tread on a litigant's due process right of access to the courts"].)

counsel. (See § 391.2 [plaintiff entitled to present "evidence, written or oral, by witnesses or affidavit" at a hearing before court makes vexatious litigant determination]; *Kinney*, *supra*, 201 Cal.App.4th at p. 957 [order to show cause gave litigant "the opportunity to respond in writing and in oral argument" to allegation he was a vexatious litigant]; cf. *In re Large* (2007) 41 Cal.4th 538, 552 [purpose of requiring notice and opportunity to be heard is to give parties "a chance to present information that may affect the decision"]; *Anderson v. Superior Court* (1989) 213 Cal.App.3d 1321, 1330 [where court imposed job search requirements on recipients of welfare benefits without prior notice, subject recipients "had no opportunity to prepare a defense against the court's action" or "to seek advice of counsel"].)

Under the circumstances here, the family court's order must be reversed. The court's determination that a self-represented party is a vexatious litigant subject to a prefiling order is a discretionary act. (*Bravo*, *supra*, 99 Cal.App.4th at p. 219.) But the court can only exercise its discretion after it has evaluated the relevant facts—which is exceedingly difficult to reliably do if the subject party is precluded from presenting evidence.[10] (See, e.g., *Martin v. Alcoholic Bev. etc. Appeals Bd.* (1961) 55 Cal.2d 867, 875 [in order to exercise judicial discretion, court must know and consider all material facts in evidence]; accord, *Hernandez v. Superior Court* (2004) 115 Cal.App.4th 1242, 1246; cf. *Webber v. Webber* (1948) 33 Cal.2d 153, 161 [where family court prejudged alimony issue against wife, it did not

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[10] Because we reverse the family court order on the ground Goodwin did not receive a fair hearing, we need not address his other contentions of error.

properly exercise its discretion to evaluate all of the evidence and therefore deprived the wife "of her day in court on a matter vitally affecting her substantial rights"].) The record shows Goodwin was often an obstreperous litigant, but that does not obviate the need for due process. Before the family court may impose a prefiling order upon Goodwin as a vexatious litigant, Goodwin must be given proper notice and an opportunity to be heard. Nothing we have said in this opinion, however, expresses a view on whether Goodwin may be declared a vexatious litigant if proper procedures are followed.

DISPOSITION

The order declaring Goodwin a vexatious litigant and requiring him to obtain prefiling permission pursuant to Code of Civil Procedure section 391.7 is reversed. Goodwin is entitled to costs on appeal.

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BAKER, J.

We concur:

RUBIN, P. J.

MOOR, J.